

STATE BAR OF CALIFORNIA
COMMISSION FOR THE REVISION OF THE RULES
OF PROFESSIONAL CONDUCT

MEETING SUMMARY - OPEN SESSION

Friday, March 16, 2007
(9:15 am - 5:00 pm)

SF–State Bar Office
180 Howard Street, Room 8-B
San Francisco, CA 94105

MEMBERS PRESENT: Harry Sondheim (Chair); Linda Foy; Robert Kehr; Stanley Lamport; Raul Martinez (LA); Kurt Melchior; Ellen Peck (LA); Hon. Ignazio Ruvolo; Jerry Sapiro; Sean SeLegue; Dominique Snyder (LA); Mark Tuft; and Tony Voogd.

MEMBERS NOT PRESENT: JoElla Julien and Paul Vapnek.

ALSO PRESENT: Starr Babcock (State Bar staff); Bill Baughman (COPRAC Liaison); Saul Bercovitch (State Bar staff); Steve Cerveris (State Bar ADR Committee); Randall Difuntorum (State Bar Staff); James Heiting (California Judges Association); Hon. James Herman (California Judges Association)[by telephone]; Diane Karpman (Beverly Hills Bar Association Liaison)[LA]; Mimi Lee (State Bar Staff); James Madison (California Dispute Resolution Council); Lauren McCurdy (State Bar staff); Barry Melton (California Public Defenders Association); Marie Moffat (State Bar General Counsel); Prof. Kevin Mohr (Commission Consultant); Toby Rothschild (Access to Justice Commission & LACBA Liaison)[by telephone]; Becky Stretch (ABA Center on Professional Responsibility)[by telephone]; Jay Welsh (JAMS); and Mary Yen (State Bar staff).

I. APPROVAL OF OPEN SESSION ACTION SUMMARIES FROM THE DECEMBER 1, 2006 AND JANUARY 26-27, 2007 MEETINGS

The December 1, 2006 action summary was deemed approved. Consideration of the January 26-27, 2007 summary was postponed to the next meeting.

II. REMARKS OF CHAIR

A. Chair's Report

The Chair led a discussion of the following Commission procedures that have been refined by leadership: (1) each member should make an effort to respond to issues posed in e-mails as such issues often require only a "yes" or "no" reply (in addition, a member who sends or replies to an e-mail will be afforded more than one opportunity to address the issue at the meeting); (2) during meetings sidebar conversations should be avoided so that the person who has the floor is the only one speaking; (3) before speaking during a meeting, a member

should raise their hand to be recognized by the Chair so that all members and visitors have a fair opportunity to speak; (4) reports on rules returning from public comment should use a uniform template (consult staff or the Consultant for the template); (5) to take a matter off the consent agenda, six written objections are required; (6) a straw vote will be taken on whether to discuss any issue raised in the public comment that was the subject of previous Commission consideration, and it will take six votes to discuss any such issues; (7) prior to a meeting, each drafting team should indicate which specific issues they will handle during the meeting time that has been allocated to avoid needless member preparation on issues for which there will be insufficient time to consider; (8) regarding dissents, they will be summarized by staff in the informal submission to the Supreme Court and staff will distribute a draft to the Commission for review; (9) when posting e-mail comments, members should clearly designate minor, non-substantive edits as “nits;” and (10) the co-vice chairs, Mr. Tuft and Mr. Vapnek, will serve as mentors on the drafting teams and will offer assistance to the drafting teams to facilitate progress between meetings.

After the Chair’s summary of the revised procedures, it was suggested that the Commission attempt an agenda with only 2 or 3 rules with the objective of using the entire meeting day to complete those few rules.

2. Staff’s Report

Staff reported on the action of the Board of Governors Committee on Regulation, Admissions and Discipline in accepting the Commission’s 2006 Accomplishments Report.

III. MATTERS FOR ACTION - CONSIDERATION OF PROPOSED RULES REDRAFTED FOLLOWING PUBLIC COMMENT (BATCH 1)

A. CONSENT - Proposed Rule 1.0.1. Law Firm Definition

This matter was called for discussion by the Chair to discuss those issues raised by members who objected to approval on consent. The Chair used a straw vote system to ascertain whether there was sufficient member interest in discussing each of the suggested changes. The issues discussed and changes implemented were the following.

(1) In the first line of the rule, the phrase “a lawyer or lawyers” was deleted (with commas changed to semicolons) (9 yes, 2 no, 0 abstain).

(2) The second line of the rule was revised to read: “. . . a sole proprietorship or an association engaged in the practice of law; . . .” (9 yes, 0 no, 1 abstain).

(3) The concept of a new comment addressing the status of a solo practitioner as a “law firm” was assigned to the drafters with Ms. Peck added to the team as the lead for this issue (5 yes, 3 no, 3 abstain).

(4) In the third sentence of Cmt. [1], the word “should” was replaced with “may” (6 yes, 3 no, 2 abstain).

(5) There was no objection to conforming this rule to the Commission's standing stylistic convention of using references to "these rules."

(6) All of the language concerning "of counsel" was deleted (7 yes, 3 no, 0 abstain).

(7) Upon further consideration of the "of counsel" issue, the Commission decided to allow the drafting team to attempt a revised comment (6 yes, 4 no, 0 abstain).

A revised draft was requested for the next meeting.

[Intended Hard Page Break]

B. **CONSENT** - Proposed Rule 1.1 [Rule 3-110]. Competence

This matter was called for discussion by the Chair to discuss those issues raised by members who objected to approval on consent. The Chair announced that there were a sufficient number of objections to take this matter off the consent agenda. The issues discussed and changes implemented were the following.

(1) In Cmt. [1], everything after the phrase “to the client” was deleted (9 yes, 1 no, 2 abstain). It was understood that this action authorized the codrafters to make conforming deletions to other comments so that the comments avoid any discussion of the concept of a duty to beneficiaries.

(2) Cmt. [2] was replaced with a shorter version of the ABA 1.3 (7 yes, 1 no, 4 abstain), including the deletion of the first sentence (7 yes, 6 no, 0 abstain) so that it reads:

~~“[2] The lawyer's duty of diligence under paragraph (b) includes the duty to the client, and to intended third party beneficiaries of the lawyer's services, to be conscientious and attentive by taking the necessary lawful and ethical measures required to advance the objectives of the representation. A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy on the client's behalf. A lawyer is not bound, however, to press for every advantage that might be realized for a client. For example, a lawyer may exercise professional discretion in determining the means by which a matter should be pursued. Competence under paragraph (b) includes the obligation to act with reasonable diligence on behalf of a client. This includes pursuing a matter on behalf of a client by taking lawful and ethical measures required to advance the client's cause or objectives. A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy on the client's behalf. A lawyer is not bound, however, to press for every advantage that might be realized for a client, or to take every available measure. For example, a lawyer may exercise professional discretion in determining the means by which a matter should be pursued. See Rules [1.2] and 1.4. The lawyer's duty to act with reasonable diligence does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process with courtesy and respect. . . .”~~

(3) In the above revised version of Cmt.[2], the phrase “or to take every available measure” was deleted (8 yes, 3 no, 1 abstain).

(4) In Cmt.[6] (which will be Cmt.[8] upon renumbering), the word “disciplinary” was deleted (10 yes, 1 no, 1 abstain).

Mr. Tuft asked that the Commission's meeting summary indicate that by not having MR 3.2 or MR 1.3, there is no “promptness” concept in the Commission's proposed California rules and that he voted against including the concept of “promptness” in any comment language because that approach would be inappropriate given the absence of a “promptness” concept in the rules proper.

With the above changes, the rule was deemed completed and approved for informal submission to the Supreme Court. The codrafters were asked to provide staff with a final version of the rule.

[Intended Hard Page Break]

C. **CONSENT - Proposed Rule 1.8.10 [Rule 3-120]. Sexual Relations With Client**

The Commission considered a revised draft of proposed Rule 1.8.10 (Draft #5.1, dated 2/26/07). The revised draft changed the public comment version of the rule from the narrow standard of existing RPC 3-120 to the broader standard of MR 1.8(j). The materials considered also included a late public comment submitted online by Michael Crockett. Ms. Peck presented the revised draft rule indicating her recommendation that the deletion of paragraph (b) (re vicarious effect on other lawyers in the law firm) be reconsidered. In addition, the Commission voted 6 yes, 4 no, 0 abstain to begin by reconsidering paragraph (a). However, before any further discussion, this matter was tabled (6 yes, 2 no, 0 abstain) in anticipation of pending legal advice from the Office of General Counsel. The Chair asked that this matter be placed on the Commission's June 8th agenda.

[Intended Hard Page Break]

D. Proposed Rule 2.4 [Rule 1-720]. Member as Third Party Neutral

At the request of interested persons, this matter was specially set by the Chair for discussion at 10:30 am. The Commission considered revised drafts 5A, 5B, 5C, and 5D2 of proposed Rule 2.4. Pursuant to the instructions of the Chair, the Commission considered draft 5D2 which was structured so that the mediation and arbitration standards would be appended to the rule as Board adopted standards. It was noted that this approach was intended to parallel the approach used in RPC 4-100 for specifying trust account record-keeping standards. The Chair welcomed the following visitors who were present for the discussion of this rule: Starr Babcock (State Bar staff); Saul Bercovitch (State Bar staff); Steve Cerveris (State Bar ADR Committee); Hon. James Herman (California Judges Association)[by telephone]; James Madison (California Dispute Resolution Council); and Jay Welsh (JAMS). With the input of the visitors, the Commission discussed four issues: (1) whether the rule should be modified to accept changes in paragraphs (a) and (b) recommended by the CDRC; (2) whether paragraph (c) and related comments should be included; (3) whether paragraph (d) and related comments should be included; and (4) whether paragraph (e) should be included. The following drafting decisions were made.

(1) The Commission considered but did not adopt any of the changes to paragraphs (a) and (b) recommended by the CDRC (specifically: 5 yes, 7 no, 0 abstain on the recommendation to delete the phrase “or other matter” in paragraph (a); and 3 yes, 8 no, 1 abstain on the recommendation to delete the phrase “when the lawyer knows or reasonably should know that a party does not understand the lawyer’s role in the matter, . . .” in paragraph (b)).

(2) All of paragraph (c) was deleted (8 yes, 3 no, 0 abstain).

(3) All of paragraph (d) was deleted (9 yes, 2 no, 1 abstain).

(4) All of paragraph (e) was deleted (8 yes, 0 no, 3 abstain).

Following discussion, the codrafters were asked to implement the changes in a revised draft and to prepare revised comments.

[Intended Hard Page Break]

E. Proposed Rule 5.6 [Rule 1-500]. Agreements Restricting a Member's Practice

The Commission considered a February 28, 2007 memorandum from Ms. Foy presenting a revised draft of proposed Rule 5.6 (Draft #2, following consideration of public comment). Mr. Sapiro, a codrafter, indicated that he concurred in the report and revised draft prepared by Ms. Foy. The Chair called for a discussion of the issues raised by the codrafters and in e-mailed comments. The following drafting decisions were made.

(1) There was no objection to the Chair deeming approved the following language as a new Cmt.[1]:

“This Rule generally prohibits restrictions on a lawyer’s right to practice except when a restriction is authorized by law. See, e.g., Business and Professions Code sections 6092.5(i) and 6093.”

(2) The Chair deemed approved paragraphs (c), (c)(1), and (c)(2), as drafted. Mr. Kehr asked that his dissent to these paragraphs be noted in the meeting summary.

(3) After further consideration, paragraph (c) was revised (4 yes, 0 no, 3 abstain) as follows:

“Notwithstanding paragraph (a)(2) of this Rule or unless otherwise proscribed by law, a lawyer may offer, participate in offering or enter into an agreement that provides for forfeiture of compensation to be paid by a law firm to ~~the lawyer~~ a [partner] or shareholder after termination of ~~the~~ that lawyer’s membership in ~~or employment by that~~ the law firm if the lawyer competes with that law firm after such termination, provided that either. . . .”

With the above changes, the rule was deemed completed and approved for informal submission to the Supreme Court. The codrafters were asked to provide staff with a final version of the rule. Mr. Tuft asked that the meeting notes state that he dissented to the final version of the rule due to concerns about enforceability.

[Intended Hard Page Break]

F. Proposed Rule 8.4 [Rule 1-120X]. Misconduct (Includes Rule 1-120 Assisting, Soliciting, or Inducing Violations)

The Commission considered Draft #8 of proposed Rule 8.4 (dated 3/4/07) submitted by Mr. Mohr. It was noted that this draft adds Cmt.[5A] to address 1st Amendment concerns raised at the last meeting. The Chair called for a discussion of the issues raised by the codrafters and in e-mailed comments. The following drafting decisions were made.

(1) In Cmt.[3], the reference to “adultery” was deleted (5 yes, 3 no, 0 abstain).

(2) All of Cmt.[7] was deleted (8 yes, 1 no, 0 abstain).

With the above changes, the rule was deemed completed and approved for informal submission to the Supreme Court. The codrafters were asked to provide staff with a final version of the rule.

[Intended Hard Page Break]

G. Proposed Rule 5.1 [Rule 1-310X]. Responsibilities of Partners, Managers, and Supervisory Lawyers

The Commission considered Draft #7 of proposed Rule 5.1 (dated 2/25/07) submitted by Mr. Mohr. The Chair welcomed Barry Melton of the California Public Defenders Association who was present for the discussion of this rule. The codrafters led a discussion of the open issues and with the input of Mr. Melton, the following drafting decisions were made.

(1) In paragraph (c)(2), there was insufficient support to revise the language to delete the initial reference to “partner” (4 yes, 5 no, 1 abstain).

(2) In the last line of paragraph (a), the word “conform” was replaced with the phrase “complied with” (6 yes, 5 no, 0 abstain).

(3) There was insufficient support for a recommendation to define “partner” along the lines of the Corporations Code (1 yes, 9 no, 1 abstain).

(4) There was no objection to conforming this rule to the Commission’s standing stylistic convention of using references to “these rules.”

(5) There was insufficient support for a recommendation to deal with the issue of “partner” by asking the codrafters to work develop a new global definition of “partner” for the anticipated terminology section of the rules (2 yes, 6 no, 2 abstain).

(6) In paragraph (c)(2), there was insufficient support for a recommendation to delete the phrase “is a partner, or” and the word “comparable” (3 yes, 6 no, 2 abstain). Mr. Melchior asked that his dissent (in favor of making this revision) be noted in the meeting summary.

(7) In Cmt.[1], the entire second sentence was deleted (9 yes, 2 no, 0 abstain).

(8) In Cmt.[2], there was insufficient support (4 yes, 7 no, 0 abstain) for a recommendation to revise it to read: “Paragraph (a) requires that the management of a law firm create and enforce policies and procedures, such as those designed to detect conflicts of interests; track dates; funds; and that inexperienced lawyers would be supervised”

(9) In Cmt.[3], there was insufficient support to replace the word “including” with the phrase “such as” (2 yes, 6 no, 2 abstain).

(10) In Cmt.[3], the first line was revised to read: “Whether particular measures or efforts satisfy. . . .” (9 yes, 1 no, 1 abstain).

(11) In Cmt.[4], there was no objection to the Chair deeming approved the codrafters’ recommendation that the string cite of supervision cases be moved to the comments to Rule 5.3.

(12) In Cmt.[4], there was no objection to replacing the word “conform” with the phrase “comply with.”

(13) By consensus, in the second line of Cmt.[6], the phrase “who are in or outside of the law firm” was added.

(14) The bracketed language in Cmt.[6] was modified to be a separate sentence that reads: "Paragraph (b) also applies to ~~includes~~ lawyers who have intermediate managerial responsibilities in public sector legal agencies and law departments." (7 yes, 1 no, 2 abstain)

(15) The codrafters were asked to include a new comment (possibly a new Cmt.[5]) that expressly states that paragraph (a) does not apply to intermediate lawyers in a public law office (7 yes, 1 no, 3 abstain).

(16) For both Cmt.[10] and [12], the phrase "in or outside a law firm" was added to modify references to "another lawyer" as a person subject to supervision (6 yes, 0 no, 4 abstain).

With the above changes, for the most part the rule was deemed completed and approved for informal submission to the Supreme Court. However, the Chair asked that one aspect of the draft rule be subjected to a 10-day ballot. That aspect was a recommendation that Cmt.[11] be revised to read: "Professional misconduct by a lawyer under supervision could reveal that a supervisory lawyer violated paragraph (b), even though the supervisory lawyer did not violate paragraph (c) because the supervisory lawyer did not direct, ratify, or know about the violation." The codrafters were asked to submit a final version of the rule to staff for processing of the 10-day ballot.

[Intended Hard Page Break]

H. Proposed Rule 5.2 [Rule 1-310X]. Responsibilities of Subordinate Lawyer

Matter carried over.

[Intended Hard Page Break]

I. Proposed Rule 5.3 [Rule 1-300]. Nonlawyer Assistants

Matter carried over.

[Intended Hard Page Break]

IV. MATTERS FOR ACTION - CONSIDERATION OF PROPOSED RULES NOT YET DISTRIBUTED FOR PUBLIC COMMENT (ANTICIPATED BATCH 2OR BATCH 3 RULES)

A. Consideration of Rule 1.8.1 [Rule 3-300]. Avoiding Interests Adverse to a Client

Matter carried over.

[Intended Hard Page Break]

B. Consideration of Rule 2-300 [ABA MR 1.17] Sale or Purchase of a Law Practice of a Member, Living or Deceased

Matter carried over.

[Intended Hard Page Break]

C. Consideration of Rule 3-100 [ABA MR 1.6 & 1.8(b)] Confidential Information of a Client

Matter carried over.

[Intended Hard Page Break]

D. Consideration of Rule 4-210 [ABA MR 1.8(e)] Payment of Personal or Business Expenses Incurred by or for a Client

Matter carried over.

[Intended Hard Page Break]

E. Consideration of Rule 4-200 [ABA MR 1.5] Fees for Legal Services

Matter carried over.

[Intended Hard Page Break]

F. Consideration of Rule 3-310 [ABA MR 1.7, 1.8, 1.9, 1.10, 1.11] Avoiding the Representation of Adverse Interests

Matter carried over.

[Intended Hard Page Break]

G. Consideration of Rule 1.2.1 [Rule 3-210] Advising the Violation of Law

Matter carried over.

[Intended Hard Page Break]